Supreme Court, U. S.
FILED
AUG 14 1980
MICHAEL RODAK, JR., CLERK

No. 79-1863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DONALD WINSTON HARPER, NEIL WILSON ROWE, JAMES MERRILL BURDINE, JOHN WHITE, DAVID RAY JENKINS, DAVID RAYMOND GOVUS, DONALD ALFRED BLACK, GARY REGAN TALBERT, RICHARD LEWIS JACKSON, MICHAEL BENJAMIN FORBES and ROBERT McNEILL HERRING,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' SUPPLEMENTAL BRIEF

BARRY NAKELL
(Counsel of Record)
1310 LeClair Street
Chapel Hill, North Carolina 27514
(919) 929-7151
Counsel for Petitioners

Of Counsel:
EUGENE GRESSMAN
325 Glendale Drive
Chapel Hill, North Carolina 27514

(Names of Counsel continued on inside cover)

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

James K. Jenkins
1000 Candler Building
Atlanta, Georgia 30303
Attorney for Petitioners
Donald Winston Harper
and Neil Wilson Rowe

Bruce H. Morris
3565 Piedmont Road
Atlanta, Georgia 30305
Attorney for Petitioners
John White and
James Merrill Burdine

Reber Boult
Suite 1500
The Healy Building
57 Forsyth Street, N.W.
Atlanta, Georgia 30303
Attorney for Petitioner
Robert McNeill Herring

John W. Stokes
4283 Memorial Drive
Suite J
Decatur, Georgia 30032
Attorney for Petitioner
David Ray Jenkins

Norman B. Kellum
P.O. Box 866
New Bern, North Carolina 28650
Attorney for Petitioner
Michael Benjamin Forbes

Steven A. Bernholz
Suite 20, Franklin Bldg.
137 East Franklin Street
Chapel Hill, North Carolina 27514
Attorney for Petitioners
Donald Alfred Black
and Gary Regan Talbert

Edwin Marger
Suite 320
6666 Powers Ferry Road
Atlanta, Georgia 30339
Attorney for Petitioner
David Raymond Govus

TABLE OF CONTENTS

Page

ARGUMENT 1

CONCLUSION 8

TABLE OF AUTHORITIES

Cases:

United States v. Hilton,
619 F.2d 127 (1st Cir. 1980) 2, 4

United States v. Warren,
578 F.2d 1058 (5th Cir. 1978) 3

United States v. Williams,
617 F.2d 1063 (5th Cir. 1980) 2, 3, 6

Statutes and Regulations:

Constitution of the United States:
Fourth Amendment 1, 3, 4, 5, 7

14 U.S.C. § 89(a) 4

19 C.F.R. § 162.3(a) (1977) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1863

DONALD WINSTON HARPER, NEIL WILSON ROWE, JAMES MERRILL BURDINE, JOHN WHITE, DAVID RAY JENKINS, DAVID RAYMOND GOVUS, DONALD ALFRED BLACK, GARY REGAN TALBERT, RICHARD LEWIS JACKSON, MICHAEL BENJAMIN FORBES and ROBERT McNEILL HERRING,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Rule 22.6, petitioners submit this Supplemental Brief to call the Court's attention to two new cases that are relevant to the first question presented by the Petition for a Writ of Certiorari: Whether the stopping, boarding and searching without probable cause or even reasonable suspicion and without a warrant of an American fishing vessel on the high seas 800 miles off the coast of the United States by a Coast Guard cutter whose primary mission was marijuana law enforcement can be justified under the Fourth Amendment as a border search, an administrative search, or a "necessary" search.

The cases are *United States v. Hilton*, 619 F.2d 127 (1st Cir. 1980) and *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (en banc). Both were decided shortly before the petition for a writ of certiorari was filed but petitioners were unaware of them at that time and the Government did not mention them in its Brief in Opposition. No further review has been sought in *Williams* but *Hilton* is pending before this Court on a petition for certiorari in No. 79-1732.

Although neither *Hilton* nor *Williams* raised the precise issue presented in this case, both involved Coast Guard searches of vessels on the high seas; and both cases demonstrate the increasing frequency with which the issue of the constitutionality of such searches is being litigated, the difficulties that the lower courts are having in grappling with that issue in the various factual contexts in which it arises, and the conflicts that are continuing to develop in the circuits regarding the proper doctrine to resolve the issue. Thus, they further illustrate the national importance of the issue and the critical need for this Court to address it.

Williams involved a foreign vessel which the Coast Guard had probable cause to believe was importing marijuana from Colombia to the United States. The Coast Guard apparently acquired its probable cause from the effective deployment of Operation Stopgap, the same mission for which the Coast Guard Cutter Alert was deployed in the present case. In January, 1978 – the operational period for Operation Stopgap – a DEA pilot observed the vessel, which was of Panamanian registry, off the coast of Colombia being loaded with marijuana. Five days later the Coast Guard observed the vessel in the Yucatan Passage, one of the Caribbean passages in addition to the Mona Passage that the Coast Guard was covering pursuant to Operation Stopgap. She hoisted a distress flag

and advised that she was en eroute to Alabama. Later, crew members began waving clothes, toilet paper and flashlights and giving hand signals, and one crew member dove overboard and told the Coast Guard that there was "dirty business" on the vessel. In addition, Panama authorized the Coast Guard to stop, board and search the vessel.

Thus, the ensuing search was clearly constitutional and all of the Judges of the Fifth Circuit agreed that it was. The Court, however, convened en banc, it explained, "to harmonize the discordant precedent that has evolved in the Fifth Circuit. . . ." 617 F.2d at 1069. The Fifth Circuit had once before sat en banc to adjudicate the constitutionality of a search at sea. *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978) (en banc). In *Williams*, the Court acknowledged "the muddled state of our precedent." 617 F.2d 1071; see also, *id.* at 1072, 1093. The Court then divided four ways about the proper doctrine to apply to the case.

The plurality of twelve Judges held that the Fourth Amendment permits the Coast Guard to stop and board a foreign vessel on the high seas at least when there is a reasonable suspicion that the vessel is subject to American jurisdiction because it is violating American law. The plurality also reiterated the Fifth Circuit law, discussed in the petition, permitting the Coast Guard to stop American vessels on the high seas "for routine safety and documentary checks." 617 F.2d at 1082. It said: "These cases reconfirm the notion that the Fourth Amendment does not necessarily require any sort of suspicion of criminal activity before a vessel may be stopped at sea." *Id.* It is unclear whether the plurality intended to limit that statement to "routine safety and documentary checks," but that is as far as that Court's precedent would support it.

Four Judges, in an opinion by Judge Rubin, pointed out that resolution of the issue was unnecessary to the decision of the case because the Coast Guard had probable cause and exigent circumstances for its action. Nevertheless, because the plurality had discussed the issue, these Judges stated their position that unless the stopping of a vessel, foreign or domestic, can be justified as a legitimate border search or administrative stop for a document and safety inspection, it may not be searched on the high seas "without probable cause and exigent circumstances." *Id.* at 1098-1099.

Six Judges, in an opinion by Judge Roney, stated their view that the Fourth Amendment does not apply to a *foreign* vessel on the high seas. *Id.* at 1091. Judge Anderson wrote that because there was probable cause and the circumstances were exigent he would not reach the issue of what standard was required.

The *Hilton* case also presented a different factual situation than the present case. *Hilton* involved a routine document and safety inspection of a vessel sailing under suspicious circumstances in the Gulf of Maine by a Coast Guard cutter on regular patrol, without any special narcotics assignment. In apparent consistency with the Fifth Circuit but in apparent conflict with the Fourth Circuit in this case, the First Circuit held that 14 U.S.C. section 89(a) "has been consistently construed as limiting such stops [by the Coast Guard of American vessels on the high seas] – in the absence of probable cause – to the necessary task of conducting safety and document inspections. [Citations omitted.] A more extensive search is permissible only if there is consent or probable cause to believe a crime has been or is being committed." 619 F.2d at 131.

The Court of Appeals held "that the stop and boarding was lawful, absent any particularized suspicion of criminal

activity aboard, because it was undertaken as a systematic 'border' stop and inquiry," App. 4a-5a, "albeit 800 miles at sea." App. 7a. It augmented that primary holding with a discussion of principles appropriate to an administrative search and an asserted governmental necessity for the search outside of all constraints imposed by the Fourth Amendment. The Government, in its brief, did not, however, even refer to the border search or "necessary" search rationales. Thus, it ignored entirely the extreme and unjustified application of border search doctrine that was the principal basis for the decision in the Court of Appeals and that will continue to have precedential impact unless overturned by this Court. Instead, the Government tried to support the search as a safety and documentation inspection of all American flag vessels under 250 feet in length that sailed through the Mona Passage. Brief for the United States in Oppositon at 5, 6-7. That position is inconsistent with the Court of Appeals' conclusion that this was a border search. It is also inconsistent with the Government's position in the Court of Appeals, where it never asserted that the Coast Guard action was a safety and documentation inspection. Instead, it stipulated: "The evidence in this case shows that the Alert was on a general law enforcement patrol with a special emphasis on drug interdiction. The crucial inquiry therefore is whether, given this purpose, it was reasonable to stop and board the vessel, and conduct inquiries thereon, without some reasonable ground for suspicion of illegal activity." Brief for Appellee at 34-35, 24. Indeed, the Assistant United States Attorney who represented the Government in the District Court and the Court of Appeals wrote counsel for petitioners on January 10, 1979, in connection with settling the contents of the Appendix in the Court of Appeals: "I do not anticipate that there will be any significant diferences on appeal concerning the reason for the Alert

being in the Mona Passage at the time it stopped and boarded the Lady Ellen. The Government stated before the District Court that the [Alert] was in the Mona Passage as a part of the Coast Guard's cooperation with the Drug Enforcement Administration's Operation Stopgap. The Alert was in the Mona Passage primarily for drug interdiction. In fact, the District Court specifically found this to be the situation." The evidence supports that position. As the Coast Guard cutter in *Williams* was stationed in the Yucatan Pasasge pursuant to Operation Stopgap waiting for information giving it probable cause to stop vessels sailing to the United States with marijuana, the Alert was stationed in the Mona Passage pursuant to Operation Stopgap. Its captain decided to stop all American vessels less than 250 feet in length "simply because of the amount of traffic, there was not a great deal of traffic, and we were just boarding every vessel that we could." A. 336-337, 445-446. Lieutenant Commander White testified: "I think . . . we didn't really . . . nobody told us, gave us direct orders to do that." A. 336. There was no evidence that the purpose of doing so was anything other than carrying out what the District Court found was "[t]he principal purpose of the Alert's mission. . . drug law enforcement," A. 104, as part of a major coordinated effort among five federal law enforcement agencies. There was no testimony and no document stating that the purpose was a safety and documentation inspection. The Alert's logs and its Commanding Officer's Night Order Book consistently recited that it was "underway in the Mona Passage pursuant to Operation Stopgap." A. 903-948. Lieutenant Commander White testified "that our primary reason down there was . . . at that particular time, was to prevent smuggling, the trafficking of drugs, yes." A. 269. Even the mess cook knew that the Alert's mission was "[t]o stop the flow of drugs through the three passages" by stopping and boarding vessels pursuant to Operation Stopgap. A. 415-417.

Furthermore, petitioners are prepared to argue, if necessary, that the safety and documentation rationale cannot justify the stopping and boarding of an American vessel on the high seas without any constraints or standards whatsoever, see Petition for Certiorari at 18-19, which is the doctrine urged by the Government. The applicable regulation, 19 C.F.R. section 162.3(a)(1977), requires "probable cause to believe that such vessel is violating or has violated the laws of the United States" before a Coast Guard officer may go on board an American vessel on the high seas "for the purpose of examining the manifest and other documents and papers and examining, inspecting and searching the vessel."

Although the Government in its Brief in Opposition, at pages 5-6, contends that only petitioners Harper and Rowe – who were the crew members on the Lady Ellen – may assert the Fourth Amendment claim, the Court of Appeals found that petitioner Govus also had "standing". App. 4a. It held that Govus had the "right of possession and control of the vessel." A. 4a, n.1. Govus filed an affidavit attesting that he had a proprietary interest in the Lady Ellen and her cargo. DEA Agent Johannesen testified that Govus was known to own an interest in the vessel. Govus gave the crew their instructions for the trip and the money for the marijuana. He met the vessel in Colombia and supervised the loading of the marijuana. He again met the Lady Ellen when she arrived in Back Creek.

Accordingly, the question of the search at sea is raised by at least one person who was the owner and in control of the vessel, who organized the venture and who exercised continuing supervision over her voyage, and two persons who were crew members present on the vessel at the time of the search. The question was decided on the merits by the District Court and again by the Court of Appeals,

after full briefing and argument. It is an important one that has been the subject of conflicting and concededly "muddled" decisions in the circuits. It is recurring with increasing frequency in the federal courts.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

BARRY NAKELL
(Counsel of Record)
1310 LeClair Street
Chapel Hill, North Carolina 27514
(919) 929-7151
Counsel for Petitioners

Of Counsel:
EUGENE GRESSMAN
325 Glendale Drive
Chapel Hill, North Carolina 27514

James K. Jenkins
1000 Candler Building
Atlanta, Georgia 30303
Attorney for Petitioners
Donald Winston Harper
and Neil Wilson Rowe

Bruce H. Morris
3565 Piedmont Road
Atlanta, Georgia 30305
Attorney for Petitioners
John White and
James Merrill Burdine

Reber Boult
Suite 1500
The Healy Building
57 Forsyth Street, N.W.
Atlanta, Georgia 30303
Attorney for Petitioner
Robert McNeill Herring

John W. Stokes
4283 Memorial Drive
Suite J
Decatur, Georgia 30032
Attorney for Petitioner
David Ray Jenkins

Norman B. Kellum
P.O. Box 866
New Bern, North Carolina 28650
Attorney for Petitioner
Michael Benjamin Forbes

Steven A. Bernholz
Suite 20, Franklin Bldg.
137 East Franklin Street
Chapel Hill, North Carolina 27514
Attorney for Petitioners
Donald Alfred Black
and Gary Regan Talbert

Edwin Marger
Suite 320
6666 Powers Ferry Road
Atlanta, Georgia 30339
Attorney for Petitioner
David Raymond Govus